CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1926

No. [redacted] 65

CLARENCE H. MYERS

vs.

HURLEY MOTOR CO., INC.

ON CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

FILED APRIL 14, 1925

(31,033)

(31,033)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 361

CLARENCE H. MYERS

vs.

HURLEY MOTOR CO., INC.

ON CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 18, 1925

[fol. 1] **IN COURT OF APPEALS OF DISTRICT OF COLUMBIA**

No. 4152

CLARENCE H. MYERS, Plaintiff in Error,

v.

HUDLEY MOTOR CO., INC., Defendant in Error

STATEMENT OF CASE

The Court of Appeals of the District of Columbia certifies that the record in the above entitled case discloses the following:

Clarence H. Myers, plaintiff in error, on the 28th day of April, 1923, then a minor of the age of 20 years, represented to the defendant company that he was 24 years of age, and engaged in the hacking business in the District of Columbia; whereupon he contracted with defendant for a Hudson touring car at the price of $650.00, upon terms set out in a conditional sales contract. Plaintiff turned in as cash payment a Ford touring car at the price of $250.00, which was subsequently sold by defendant company for that price. Plaintiff subsequently made payments on the contract to the amount of $156.12, making a total payment on the contract of $406.12.

On October 3, 1923, plaintiff being in default in his payments, defendant company repossessed itself of the Hudson car, under the terms of its sale agreement. Plaintiff [fol. 2] attained the age of 21 years on October 21, 1923, and, on the 1st day of November following, disaffirmed his contract and demanded the return of $406.12, the amount paid upon the contract. Upon defendant's refusal to comply with plaintiff's request, the present suit was brought in the Municipal Court of the District of Columbia by plaintiff to recover $406.12, the amount paid by him.

Defendant company set up [illegible] amount of $525.96, supported by a bill of particulars, showing that this amount was required in the way of repairs and expense to place the Hudson car in as good condition as it was when sold to plaintiff. The Municipal Court gave

judgment upon defendant's plea of set off for the full amount of $525.96, from which the case was brought to the Court of Appeals on writ of error.

The misrepresentation by plaintiff of his age, supported by evidence that he had the appearance of a man of 24, at the time the contract was made, and the depreciation in the value of the Hudson car from hard and abusive usage, are not denied by plaintiff, and may be accepted for the purpose of this case as conceded facts. Neither does it appear that any deception or misrepresentations were made by the defendant in order to induce the making of the contract, nor that the contract was in any respect an unfair one. Plaintiff rests his case entirely upon his absolute right, on becoming of age, to disaffirm his contract, and recover the amount which he had paid thereon, regardless of any damage the defendant may have sustained, either from [fol. 3] his misrepresentation as to his correct age, or from his abusive use of the Hudson car which resulted in the depreciation above set forth.

QUESTIONS CERTIFIED—Filed March 28, 1925

The Court of Appeals respectfully certifies that the following questions of law arise upon the record, the decision of which is necessary for the proper disposition of the cause; and to the end that a correct result may be reached, desires the instruction of the Supreme Court of the United States upon the said questions, to wit:

1. Is the plaintiff, by reason of the misrepresentations as to his correct age, estopped from maintaining an action to recover the amount paid under the conditional sales contract upon the purchase price of the Hudson car?

2. If the plaintiff is not so estopped, may defendant, by way of affirmative defence against plaintiff's claim, set off the amount paid for the repair of the damaged Hudson car, or so much thereof as will equal plaintiff's claim?

George E. Martin, Chief Justice. Charles H. Robb, Associate Justice. Josiah A. Van Orsdel, Associate Justice.

[File endorsement omitted.]

[fol. 4] Clerk's certificate to foregoing papers omitted in printing.

Endorsed on cover: File No. 31,033. District of Columbia Court of Appeals. Term No. 361. Clarence H. Myers vs. Hurley Motor Co., Inc. (Certificate.) Filed April 14, 1925. File No. 31,033.

(13)

Exhibit to Motion to Bring up the Entire Record and Cause

Supreme Court of the United States

OCTOBER TERM, 1926

No. 65

CLARENCE H. MYERS

vs.

HURLEY MOTOR CO., INCORPORATED

ON CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

FILED , 192

(31,083)

(31,033)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 65

CLARENCE H. MYERS

vs.

HURLEY MOTOR CO., INCORPORATED

ON CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 4, 1926

[fol. 1]

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 4152

CLARENCE H. MYERS, Plaintiff in Error,

vs.

HURLEY MOTOR CO., INC.

Municipal Court of the District of Columbia

No. 98425

CLARENCE H. MYERS, Plaintiff,

vs.

HURLEY MOTOR CO., INC., Defendant

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Municipal Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

AFFIDAVIT OF MERIT—Filed December 14, 1924

In the Municipal Court of the District of Columbia

No. 98425

CLARENCE H. MYERS, Plaintiff,

vs.

HURLEY MOTOR CO., INC., Defendant

Affidavit of Merit

DISTRICT OF COLUMBIA, ss:

Clarence H. Myers, being first duly sworn, on oath deposes and says that he is the plaintiff named in the above-[fol. 2] entitled cause, in which the Hurley Motor Co., Inc., is named as defendant; that he has a good cause of action

against the defendant, which said cause of action is as follows, to-wit:

That on, to-wit, the 28th day of April, 1923, he, affiant, being then a minor of the age of 20 years, contracted, in so far as he was able, with the defendant for the sale by said defendant to him of a Hudson touring car for the price of $650.00, upon the terms and conditions set out in the conditional sales contract signed by affiant and defendant, a copy of which is hereto attached, marked Exhibit "A," and prayed to be read and taken as a part hereof; affiant turned over to the said defendant a 1922 Ford touring car and was allowed by defendant a credit of $250.00 therefor, and affiant is advised and believes and therefore avers that the said defendant subsequently sold the said Ford touring automobile turned in as aforesaid by plaintiff for a sum exceeding $250.00; that on the 2nd day of May, 1923, plaintiff paid to defendant the sum of $50.00; on the 4th day of June, 1923, the sum of $35.20 and on the 9th day of July, 1923, the sum of $35.37, and on the 27th day of August, 1923, the sum of $35.55; all of said payments being made on account of the said 1919 Hudson touring car purchased from defendant as aforesaid; that the said Hudson touring automobile is not and was not necessary for affiant; that affiant attained the age of twenty-one years on the 21st day of October, 1923, and that, being advised of his right as a minor to renounce the said contract, affiant did on the 3d day of October, 1923, renounce said contract and said defendant took possession of the said Hudson automobile aforesaid; affiant demanded of the defendant that it return to him the sum of money realized from the sale of the Ford touring car which had been turned over to defendant by plaintiff and the amount for which he was given credit by defendant therefor, to-wit, $250.00, together with the sum of $155.00, plus interest paid by affiant to defendant, as set forth in Particulars of demand annexed hereto.

But defendant, notwithstanding the demand of the plaintiff, refused and still does refuse to pay the plaintiff the sums of money jointly due and owing to him from the defendant; and affiant says that there is now justly due and owing to him from the defendant the sum of $406.12, with interest from the 3d day of October, 1923, exclusive of all set-offs and just grounds of defense.

Clarence H. Myers. George P. Lemm, Attorney for Plaintiff.

Subscribed and sworn to before me this 30th day of November, 1923.

Paul C. Robbin, Notary Public, D. C.

[fol. 3] Particulars of Demand—Filed December 14, 1923

* * * * * * *

April 28, 1923. To value of one Ford touring car, 1922 model, amount received by defendant	$250 00
May 2, 1923. By cash	50 00
June 4, 1923. By cash	35 20
July 9, 1923. By cash	35 37
Aug. 27, 1923. By cash	35 55
Total	$406 12

Affidavit of Defense—Filed January 28, 1924

* * * * * * *

District of Columbia, ss:

William J. Tidball, being first duly sworn according to law, on oath deposes and says that he is vice-president of the Hurley Motor Company, a corporation, and is the person authorized by said corporation to make oath hereto; that the defendant is not indebted unto the plaintiff in the sum of $406.12 nor in any other sum whatsoever, as claimed in the affidavit of merit filed herein, for that, at the time of the purchase by the plaintiff of the automobile referred to in said affidavit of merit, the said plaintiff represented to defendant that he was an adult of the age of twenty-four years and engaged in the hacking business, that is to say, in the transportation by automobile of passengers for hire, but that the automobile which he then had was not adequate for his business and he needed and required a larger one; that in pursuance of the aforementioned representations the defendant sold to plaintiff the Hudson automobile in controversy, taking in trade as part payment the Ford automobile upon which an allowance was made of $250.00; that

thereafter from time to time plaintiff paid to defendant the amounts set forth in plaintiff's bill of particulars, but at no time did plaintiff inform the defendant that he was a minor and desired to rescind his contract of purchase, but that in the month of October, 1923, plaintiff being in arrear of payments agreed upon on account of the purchase of the Hudson automobile aforesaid defendant repossessed the said Hudson automobile because of default in payment and held the same subject to the order of plaintiff upon his making the payments as agreed; that when said automobile was repossessed by defendant the same was in a badly damaged condition and the defendant was compelled to expend, in restoring said automobile to the same condition it was in [fol. 4] at the time of the purchase by plaintiff, the sum of $525.96 and defendant says that said automobile, by reason of the use by the plaintiff was depreciated to that extent; that defendant is informed and believes and expects to prove by competent evidence at the trial hereof, that plaintiff used said automobile in the hacking business and that said plaintiff was actually engaged therein and that, therefore, said automobile as purchased by plaintiff was at the time of said purchase and thereafter a necessary; that during the time that said plaintiff used the said automobile in his business as aforesaid he earned from its said use a large sum of money which the defendant is informed, and expects to prove by competent evidence at the trial hereof, was $400.00; that the reasonable value of the use of said automobile during the time it was in possession of the plaintiff, to wit, from the 28th day of April, 1923, until the 3rd day of October, 1923, is $400.00.

Wherefore, defendant says that it is not indebted unto the plaintiff in the sum of $406.12 nor in any other sum whatsoever.

William J. Tidball.

Subscribed and sworn to before me this 24th day of January, 1924. Nena Hodges Spence.

PLEA OF SET-OFF—Filed January 28, 1924

* * * * * * *

The defendant says that the plaintiff was at the commencement of this suit, and still is indebted to it in the sum of $525.96 for that heretofore, to wit, on the 28th day of April, 1923, plaintiff and defendant entered into a written contract providing for the purchase by the plaintiff of a certain Hudson automobile; that said contract provided among other things that title to said automobile should remain in defendant until the same was fully paid for; and also provided for certain monthly installment payments on account; that thereafter, during the month of October, plaintiff being in arrears on account of said payments, defendant repossessed said automobile as provided in the agreement aforesaid and found the same to be in a badly damaged condition requiring a great deal of repair; that defendant, in order to restore said automobile to its prior condition, was compelled to expend thereon the sum of $525.96 as is shown by the Bill of Particulars hereto annexed and made a part hereof; that the said plaintiff, although thereunto often requested, has wholly failed, neglected and refused to pay said sum or any part thereof, so that there is now due and owing on account thereof from the plaintiff to the defendant the sum of $525.96 and the defendant is willing that the same may be set off against the plaintiff's demand.

Darr, Whiteford & Darr, Attorneys for Defendant.

[fol. 5] PARTICULARS OF DEMAND—Filed January 28, 1924

* * * * * * *

Oct. 6.	Shims, screws, C-8019	$1 47
9.	1 set of Timing Gears, C-8082	15 60
	True up Crank, C-9103	1 00
	Repair Clutch, C-9105	13 46
10.	Shims, Parts, C-8109	2 69
11.	Conn. Rod Bearing, 2 Nuts, 24 screws, 5 bearings, 12 Shims, C-8127	8 56
	12 Rivets, C-8128	10
Oct. 12.	1 Nut, 1 Shim, Cotter Pins, Hose & Clamp, C-8142	2 20
13.	Ring Compressor, C-8181	1 68
15.	Repair Radiator, S. O. #9125	5 50

	16. 1 Cylinder Head Gasket, 1 Bolt & Nut, 12 Nuts, C-8211	1 70
	13. Gas P. C. V	1 00
	17. 18′ Ignition Wire, 2 Nuts, Misc. Parts, 1 Bearing Belt, C-8237	78 68
	18. Repair Spool, C-8251	26
	Parts, C-8258	1 99
	5 Gal. Gas, Parts, C-8259	2 65
	Parts, C-8260	3 54
	19. Oil, C-8279	50
	6 Spark Plugs, 1 Cylinder Head, 1 Plug, 1 Head Gasket, C-8282	19 66
	20. Gas, C-8299	90
	22. 48 Washers, C-8330	40
	23. 1 Qt. Oil, 12 Nuts & Washers, 1 Cap Screw, C-8346, 4 Cap Screws, Nuts & Fork Washers, Parts (Hudson)	1 87
	24. 1 Yoke, Parts, 13′ Broke Timing, C-8366	13 05
	25. Parts, C-8384	20
	Brake Lining, C-8387	2 86
	Repair Battery, S. O. #9177	9 75
	26. 5 Gal. Gas, 1 W. S. Glass, 1 Steering Shift Bushing & Key, C-8412	12 40
	27. 1 Delco Punger, C-8435	1 12
	29. Rental Battery, 1 R. & S., Bulb C-8460	1 30
Nov.	9. Repaint Car, S. O. #9227	50 00
Dec.	3. Battery, C-9062	6 25
	4. Repair Curtain & Cushions	4 00
	5. 1 Front Floor Mat, 2 Straps, C-9102	7 10
	5. Gas, P. C. V	85
	10. Gas, P. C. V	51
		$274 80
[fol. 6]	Labor, 88 hours, @ $1.50 per hour	132 00
		$406 80
	Labor & Storage on Hudson, Tippetts Garage, 10/3	20 00
	Labor & Storage on Hudson, Peerless Machine Shop, 10/3	89 16
	Total	$525 96

PLEA OF SET-OFF—Filed January 28, 1924

* * * * * * *

Comes now the defendant and for a further plea says that the plaintiff was at the commencement of this suit and still is indebted to it in the sum of $400.00 for that heretofore, to wit, on the 28th day of April, 1923 plaintiff and defendant entered into a written contract providing for the purchase by the plaintiff of a certain Hudson automobile; that said contract provided among other things that the title to said automobile should remain in the defendant until the same was fully paid for, and also provided for certain monthly installment payments on account; that thereafter, during the month of October, plaintiff being in arrears on account of said payments, defendant repossessed said automobile as provided in the agreement aforesaid.

Wherefore, defendant says that it is entitled to recover from the plaintiff the reasonable value of the use of the said automobile from the 28th day of April, 1923, until the 3rd day of October, 1923, and that said reasonable value of said use is $400, and the defendant is willing that the same may be set off against the plaintiff's demand.

Darr, Whiteford & Darr, Attorneys for Defendant.

MOTION FOR JUDGMENT UNDER RULE 16—Filed February 11, 1924

* * * * * * *

Now comes the plaintiff, and moves the Court to enter judgment for plaintiff for want of a sufficient affidavit of defense.

George P. Lemm, Attorney for Plaintiff.

[fol. 7] MEMORANDUM

Plaintiff's motion for judgment for want of sufficient affidavit of defense overruled, January 28, 1924. Minutes 8, page 477.

DEMURRER—Filed February 11, 1924

* * * * * * *

Now comes the plaintiff and says that the plea of set-off of defendant for $525.96 is bad in substance.

George P. Lemm, Attorney for Plaintiff.

It will be argued that, as a matter of law, an infant, upon disaffirmance of his contract of purchase of personal property, is not chargeable with depreciation of said property while in his possession.

DEMURRER—Filed February 11, 1924

* * * * * * *

Now comes the plaintiff and says that the plea of set-off of defendant for $400.00 is bad in substance.

George P. Lemm, Attorney for Plaintiff.

It will be argued that, as a matter of law, an infant, upon disaffirmance of his contract of purchase of personal property, is not chargeable with use or rental of said property while in his possession.

MEMORANDUM

Plaintiff's demurrer to defendant's plea of set-off for $525.96 overruled. Further, plaintiff's demurrer to defendant's plea of set-off for $400.00 overruled, February 16, 1924. Minutes 8, page 495.

JUDGMENT—Entered February 23, 1924

It appearing under Rule of Court that judgment on finding in this cause should be entered, it is so ordered. Wherefore, it is considered that the defendant recover of plaintiff, on its plea of set-off, the sum of Five Hundred Nineteen Dollars and Eighty-four cents ($519.84), with interest from date and costs.

[fol. 8] Assignment of Errors—Filed April 3, 1924

1. The Court erred in overruling plaintiff's motion for judgment on Rule 16 for want of a sufficient affidavit of defense.

2. The Court erred in overruling plaintiff's demurrers to defendant's pleas of set-off.

3. The Court erred in overruling plaintiff's motion for judgment upon agreed statement of facts submitted.

4. The Court erred in its ruling that defendant was entitled in set-off against plaintiff's claim amount of depreciation of automobile purchased; and in its ruling that defendant was entitled in set-off against plaintiff the reasonable value of the use of said automobile while in plaintiff's possession.

5. The Court erred in entering judgment for defendant upon agreed statement of facts in amount $519.84.

George P. Lemm, Attorney for Plaintiff.

Designation of Record—Filed April 3, 1924

The Clerk of the Court, in making up the transcript of record on appeal in the above-entitled cause, will include therein the following:

1. The affidavit of merit;
2. The affidavit of defense;
3. The pleas of set-off;
4. The motion for judgment on Rule 16;
5. The demurrers to the pleas of set-off;
6. The judgment;
7. The assignment of errors;
8. This designation.

George P. Lemm, Attorney for Plaintiff.

[fol. 9] Filed Mar. 31, 1924. Municipal Court, District of Columbia

In the Municipal Court of the District of Columbia

No. 98425

Clarence H. Myers, Plaintiff,

v.

Hurley Motor Co., Inc., Defendant.

Be it remembered that on the 16th day of March, 1924, before the Honorable Robert E. Mattingly, Judge of the Municipal Court of the District of Columbia, the above-entitled cause came on to be heard on motion of plaintiff for judgment on Rule 16 for want of a sufficient affidavit of defense, which said motion was filed in said cause and reference to which is hereby made; that said motion was overruled, to which ruling plaintiff then and there duly excepted, which exception was allowed; that plaintiff thereupon filed demurrers to defendants' plea of set off, reference to which said demurrers is hereby made, and, after argument thereon, said demurrers were separately overruled, to which rulings plaintiff then and there duly excepted, which exceptions were allowed; and thereupon the parties plaintiff and defendant, respectively, proceeded to trial upon an agreed statement of facts, duly signed and filed in said cause, which said agreed statement of facts reads in words and figures as follows:

"That the plaintiff, on the 28th day of April, 1923, being then a minor of the age of 20 years, in so far as he was able contracted with the defendant for the sale by said defendant to him of a Hudson touring car for the price of $650, upon the terms set out in conditional sales contract signed by plaintiff, copy of which is attached to plaintiff's affidavit; plaintiff turned over to defendant in part payment for said Hudson automobile a 1922 Ford touring car and was allowed by defendant a credit of $250, therefor; that plaintiff subsequently made monthly payments aggregating $156.12, making a total of $406.12 paid by plaintiff to defendant on said purchase price of $650; that, plaintiff being in arrears of payments agreed upon on account of the

purchase of said Hudson automobile, defendant repossessed itself thereof on the 3d day of October, 1923, the plaintiff being at said time a minor; plaintiff attained the age of twenty-one years on October 21, 1923, and on or about the 1st day of November, 1923, demanded of the defendant that it return to him the sum of $250 which it had realized from the sale of the Ford touring car which had been turned over to defendant by plaintiff and the amount for which he was given credit by defendant therefor, together with the sum of $156.12 paid by plaintiff to defendant as aforesaid, which demand was refused; that, at the time of the purchase by plaintiff from defendant of said Hudson automobile he represented to defendant's agent that he was twenty-four years; that he was engaged in the hacking business and needed and required said Hudson automobile for his [fol. 10] business; that when said automobile was repossessed by defendant, it was in badly damaged condition and defendant was compelled to expend in restoring said automobile to same condition it was in at time of purchase by plaintiff the sum of $525.96, and that, by reason of the use by plaintiff, was depreciated to that extent; that plaintiff used said automobile in hacking business from the 28th day of April, 1923, until the 3d day of October, 1923, and that the reasonable value of the use of said automobile during said time is $400.00."

Thereupon plaintiff moved for judgment for $406.12 and interest, which motion was overruled, to which ruling plaintiff excepted, and judgment was entered for defendant in the sum of $519.84, to which plaintiff then and there duly excepted, and to which said ruling and the entry of judgment plaintiff was allowed exceptions, before said entry of judgment.

And plaintiff prays the Court to sign and seal this his bill of exceptions, which is accordingly done now for then, this 31st day of March, 1924.

Robt. E. Mattingly, Justice.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Robert E. Mattingly, Judge of the Municipal Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Municipal Court, before you, between Clarence H. Myers, plaintiff, and Hurley Motor Company, Incorporated, No. 98,425, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Court of Appeals of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 20 days from the settling of the bill of exceptions, or within such additional time after the expiration of the 20 days as the court below or a judge thereof for sufficient cause shall allow; that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

[fol. 11] Witness the Honorable Constantine J. Smyth, Chief Justice of the said Court of Appeals, the 13th day of March, in the year of our Lord one thousand nine hundred and twenty-four.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. (Seal of Court of Appeals, District of Columbia.)

Allowed by Constantine J. Smyth, Chief Justice of the Court of Appeals of the District of Columbia.

Filed Mar. 13, 1924. Municipal Court, District of Columbia

MUNICIPAL COURT OF THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Blanche Neff, Clerk of the Municipal Court of the District of Columbia, hereby certify the foregoing pages, numbered from 2 to 14, both inclusive, to be a true and correct transcript of the record, according to direction of counsel herein filed, copy of which is made part of this transcript, in Cause, At Law No. 98425, wherein Clarence H. Myers is plaintiff, and Hurley Motor Co., Inc., is defendant, as the same that remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 10th day of April, 1924.

Blanche Neff, Clerk. (Seal of Municipal Court of the District of Columbia.)

Endorsed on cover: District of Columbia Municipal Court. No 4152. Clarence H. Myers, plaintiff in error, vs. Hurley Motor Co. Inc. Court of Appeals, District of Columbia. Filed Apr. 10, 1924. Henry W. Hodges, clerk.

[fol. 12] I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify the foregoing printed pages numbered from 1 to 11, inclusive, to be a true copy of the record upon which the case of Clarence H. Myers, Plaintiff in Error, vs. Hurley Motor Co., Incorporated, No. 4152, was tried and determined in the said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 24th day of September, A. D. 1926.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. (Seal of Court of Appeals, District of Columbia.)

DENIED Dec 7- 1925

FILED
NOV 25 1925
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. [redacted] 65

CLARENCE H. MYERS

vs.

HURLEY MOTOR CO., INC.

MOTION FOR CERTIFICATION OF ENTIRE RECORD.

GEORGE P. LEMM,
Attorney for Movant, Clarence H. Myers.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 361

CLARENCE H. MYERS

vs.

HURLEY MOTOR CO., INC.

MOTION FOR CERTIFICATION OF ENTIRE RECORD.

Now comes Clarence H. Myers, by his attorney, George P. Lemm, and moves this Honorable Court to require that the entire record in this cause be certified to this Court from the Court of Appeals of the District of Columbia, in which Court said cause is known as "Clarence H. Myers, Appellant, *vs.* Hurley Motor Co., Inc., Appellee, No. 4152."

The Court of Appeals of the District of Columbia in this cause certified to this Court two questions or propositions of law concerning which it desired instructions for the proper decision of said cause, to-wit:

> "1. Is the plaintiff, by reason of the misrepresentations as to his correct age, estopped from maintaining an action to recover the amount paid under the conditional sales contract upon the purchase price of the Hudson car?
>
> "2. If the plaintiff is not estopped, may defendant, by way of affirmative defense against plaintiff's claim, set off the amount paid for the repair of the damaged Hudson car, or so much thereof as will equal plaintiff's claim?"

The said Court of Appeals, in certifying the foregoing propositions of law to this Court for instruction, stated in its certificate which is filed in this cause, among other things, that the record disclosed, the following:

> "The misrepresentation by plaintiff of his age, supported by evidence that he had the appearance of a man of twenty-four, at the time the contract was made, and the depreciation in the value of the Hudson car from hard and abusive usage, was not denied by plaintiff, and may be accepted for the purpose of this case as conceded facts."

In due time, the said appellant, Myers, by his attorney, made motion in said Court of Appeals in said cause to amend the said Certification by omitting from the last above-quoted sentence thereof the words

> "supported by evidence that he had the appearance of a man of twenty-four at the time the contract was made."

Said motion to amend the Certificate was based on the following grounds:

> "The evidence, which is set forth in the agreed statement of facts, does not show that appellant did, in fact, have the appearance of an adult, nor is it admitted or so set forth in any pleading in the case, nor was it admitted by appellant's counsel; on the contrary, defendant did not, in his pleading, claim or allege that appellant had the appearance of a man of twenty-four years."

And, thereupon, the said Court of Appeals overruled the said motion to amend said Certification.

The grounds of this motion that this Honorable Court require that the entire record in this cause be certified to it are the same as contained in the motion to amend which was filed in the said Court of Appeals, and the grounds of which have just been quoted. A certified copy of the record in said cause has been filed in this cause as a part of this motion, and reference to same is hereby made, and an inspection of said record—the bill of exceptions or the pleadings—will certainly fail to disclose any foundation for the statement contained in the Certification, to-wit,

> "supported by evidence that he had the appearance of a man of twenty-four at the time the contract was made".

It is submitted that, if this Honorable Court undertook to instruct the Court of Appeals of the District of Columbia on the questions of law submitted *and on the evidence or facts as disclosed by said Certification* (*and not by the record*), an adverse decision to movant by this Honorable Court would be based upon an erroneous statement of facts and would certainly be greatly prejudicial to him.

It is, therefore, respectfully submitted that this motion is supported by sufficient grounds; that a mere inspection of the certified copy of the record filed herewith will disclose that the statements contained in this motion are true; and that, by virtue of rule of this Court No. 34, this motion should be granted.

GEORGE P. LEMM.

Attorney for Movant, Clarence H. Myers.

(8358)

APR 2 1926
WM. R. STANSBURY
CLERK

Supreme Court of the United States

October Term, 1925.

No. [redacted] 65

CLARENCE H. MYERS

vs.

HURLEY MOTOR CO., INC.

BRIEF FOR CLARENCE H. MYERS,

GEORGE P. LEMM,
Attorney for Clarence H. Myers.

THE REPORTER CO., WALTON, N. Y.
New York Office: 233 Broadway, Room 514. Phone 6975 Barclay.
1926

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925,

No. 361.

CLARENCE H. MYERS

vs.

HURLEY MOTOR CO., Inc.

STATEMENT OF THE CASE.

This case is here on certificate from the Court of Appeals of the District of Columbia, the said Court of Appeals desiring the instructions of this Honorable Court on the following questions of law:

> 1. Is the plaintiff, by reason of the misrepresentations as to his correct age, estopped from maintaining an action to recover the amount paid under the conditional sales contract upon the purchase price of the Hudson car?
>
> 2. If the plaintiff is not so estopped, may defendant, by way of affirmative defence against plaintiff's claim, set off the amount paid for the repair of the damaged Hudson car, or so much thereof as will equal plaintiff's claim?

This was an action brought by Clarence H. Myers in the Municipal Court of the District of Columbia against the Hurley Motor Co., Inc., for $406.12. The record discloses that Clarence H. Myers, plaintiff

in the Municipal Court suit, on the 28th day of April, 1923, then a minor of the age of 20 years, represented to the Hurley Motor Co., Inc., defendant in the Municipal Court suit, that he was 24 years of age, and engaged in the hacking business in the District of Columbia; whereupon he contracted with said defendant for a Hudson touring car at the price of $650 upon terms set out in a conditional sales contract. Plaintiff turned in as cash payment a Ford touring car at the price of $250, which was subsequently sold by defendant company for that price. Plaintiff subsequently made payments on the contract to the amount of $156.12, making a total payment on the contract of $406.12.

On October 3, 1923, plaintiff being in default in his payments, defendant company repossessed itself of the Hudson car, under the terms of its sale agreement. Plaintiff attained the age of 21 years on October 21, 1923, and, on the 1st day of November following, disaffirmed his contract and demanded the return of $406.12, the amount paid upon the contract. Upon defendant's refusal to comply with plaintiff's request, the present suit was brought in the Municipal Court of the District of Columbia by plaintiff to recover $406.12, the amount paid by him.

Defendant company set up, as a counterclaim, the amount of $525.96, supported by a bill of particulars, showing that this amount was required in the way of repairs and expense to place the Hudson car in as good condition as it was when sold to plaintiff. The Municipal Court gave judgment upon defendant's plea of set-off for the full amount of $525.96, from which the case was brought to the Court of Appeals on writ of error.

The misrepresentation by plaintiff of his age and

the depreciation in value of the Hudson car were not denied by plaintiff, and the certificate recites that the record showed there was evidence that plaintiff had the appearance of a man of 24 at the time the contract was made. Plaintiff rested his case upon his absolute right, on becoming of age, to disaffirm his contract and recover the amount which he had paid thereon, without having to account for the depreciation in the Hudson car above set forth while same was in his possession.

Authorities and Argument.

As to the first question of law, the authorities seem to be all one way, and that is that an estoppel is not applicable to infants:

Sims vs. Everhardt, 102 U. S. 300-313.
Burdett vs. Williams, 30 Fed. 697.
Tobin vs. Spann, 85 Ark. 556, 109 S. W. 534, 16 L. R. N. S. 1672.
McKamy vs. Cooper, 81 Ga. 679, 8 S. E. 312.
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International Text Book Co. vs. Conelly, 206 N. Y. 188, 99 N. E. 722, 42 L. R. N. S. 1115.

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Frank Spangler Co. vs. Haupt, 53 Pa. Super. 545.
Norris vs. Vance, 37 S. C. L. 164.
Whitcomb vs. Joslyn, 51 Vt. 79, 31 Am. R. 678.
Leslie vs. Sheill, 3 K. B. 607, 6 B. R. C. 738.
Alvey vs. Reid, 115 Ind. 148.
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Keen vs. Coleman, 39 P. 299.

In the case of *Sims vs. Everhardt* (*supra*), the facts were these:

On the 28th day of May, 1847, Anna A. Sims, complainant in that case, who was then a minor of the age of 19, executed a deed to certain real estate (which her father had given her two years prior) to Magdalena Everhardt, the mother of the defendant in the case, and she was paid the purchase money. When the deed was executed, some doubts by the grantee were entertained upon the question as to whether the complainant was of full age, and, to remove them, she signed a statement, which was written on the deed, declaring "that she was twenty-one years of age on the 25th day of September, 1846." Later, complainant disaffirmed her deed and demanded possession of the land. This Court, on page 313 of the opinion, said:

> "The remaining question is, whether she is estopped by anything which she has done from asserting her right to the land in controversy. In regard to this very little need be said. It is not insisted that she has done anything since she has attained her majority which can work an estoppel. All that is claimed is, that

when she made her deed she asserted that she was of age and competent to convey * * *.

"The question is whether acts and declarations of an infant during infancy can estop him from asserting the invalidity of his deed after he has attained his majority. In regard to this there can be no doubt, founded either upon reason or authority. Without spending time to look at the reason, the authorities are all one way. An estoppel *in pais* is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity. *Brown vs. McClune*, 5 Sandf. (N. Y.) 224; *Keen vs. Coleman*, 39 Pa. St. 299. A conveyance by an infant is an assertion of his right to convey. A contemporaneous declaration of his right or of his age adds nothing to what is implied in his deed. An assertion of an estoppel against him is but a claim that he has assented or contracted. But he can no more do that effectively than he can make the contract alleged to be confirmed."

In the case of *Tobin vs. Spann* (*supra*), property was left to the widow and three children by Tobin (deceased), which property the widow and children afterwards sold to Spann. Subsequently, the children sued to recover the property on the ground that, at the time they sold same, they were minors. At the trial it was proved that the children, as well as the widow, represented that the children were of full age, *and the evidence showed that they all appeared to be of full age.* The Court said:

"It is not contended now by the appellee that the testimony meets or overcomes the evidence adduced by the appellants tending to show that appellants were minors at the time

of the execution of the deed in controversy, but it is now contended by the appellee that such representations were false, and that, by reason of such false representations, they are estopped to disaffirm the deed. This presents the issue squarely. Can a minor, when he has reached that age of maturity where his appearance indicates that he is of full age, by false representations that he is of age, estop himself from disaffirming the contract? * * * The doctrine that an infant is not estopped by false representation as to his age rests upon the principle that one under disability of minority has no power to remove the disability by a representation, and that his representations cannot be of greater force than the contract itself. In a case precisely like this, the Supreme Court of the United States used the following language:

"'An estoppel *in pais* is not applicable to infants, and a fraudulent representation of capacity cannot be equivalent for actual capacity. * * * *Sims vs. Everhardt*, 102 U. S. 313.'

"This case has been quoted with approval by this Court, and while the precise question involved here has never been passed upon by this Court, the trend of all decisions in this state has been toward the doctrine that an infant cannot estop himself by representations as to his age for the reason that such an act would denude the minor of the mantle thrown around him by the policy of the law to protect him from the heedlessness of the youth and the machinations of others. The doctrine that an infant is not estopped to set up his minority because of his false representations as to his age has been announced in the following cases:

"*Conrad vs. Lane*, 26 Minn. 389; *Alt vs. Graff*, 65 Minn. 191; *Alvey vs. Reid*, 115 Ind. 148; *Wieland vs. Kobick*, 110 Ill. 16; *Whitcomb*

vs. Joslyn, 51 Vt. 79; *Carolina Bldg. & Loan Assoc. vs. Black*, 119 N. C. 323.

> "The two latter cases point out in clear and forcible language the evils that would result from the doctrine of estoppel in such cases. While the rule announced may work a hardship in individual cases, it is better so than that the very weakness that the law is intended to shield the minor against should be turned into a weapon with which to deprive him of his property."

It is true that the conduct of the infant in cases like the one under consideration works a fraud upon the other party: nevertheless, the authorities hold that he is entitled to recover. It will be seen that in most of the authorities cited in answer to the second question of law propounded that the infants, in those cases, had falsely represented themselves to be of age. In the case of *Tucker vs. Moreland*, 35 U. S. 10 Peters, 58, this Court said:

> "* * * In many cases the disaffirmance of a deed made during infancy is a fraud upon the other party. But this has never been held sufficient to avoid the disaffirmance, for it would otherwise take away the very protection which the law intends to throw around him to guard him from the effects of his folly, rashness, and misconduct. In *Saunderson vs. Marr*, 1 H. Bl. 75, it was held that a warrant of attorney given by an infant, although there appeared circumstances of fraud on his part, was utterly void, even though the application was made to the equity side of the Court to set aside a judgment founded on it. So, in *Conroe vs. Birdsall*, 1 Johns. Cas. 127 (1 Am. Dec. 105), a bond made by an infant, who declared at the time that he was of age, was held void, notwithstanding his fraudulent declarations

for the Court said that a different decision would endanger all the rights of infants. A similar doctrine was held by the Court in *Curtin vs. Patton*, 11 Serg. & R. 309, 310. Indeed, the same doctrine is to be found affirmed more than a century and a half ago, in *Johnson vs. Pie*, 1 Lev. 169, 1 Sid. 258, 1 Keb. 905, 913." * * *

Second Question of Law.

By the weight of authority and in all state courts which adhere to the doctrine laid down by the Supreme Court in *Sims vs. Everhardt, supra*, we find the established rule to be that an infant, who avoids a purchase by him under a contract of a conditional sale and returns the article purchased, is not required to account to the seller for wear, tear, and depreciation for the article while in his hands.

MacGreal vs. Taylor, 167 U. S. 688.
McCarthy vs. Henderson, 138 Mass. 310.
Knudson vs. General Motor Co., 230 Mass. 54.
Morse vs. Ely, 154 Mass. 458.
Pyne vs. Wood, 145 Mass. 558.
Dube vs. Beaudry, 150 Mass. 448.
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Chandler vs. Simmons, 97 Mass. 508.
Wieland vs. Kobick, 110 Ill. 16.
Hauser vs. Marmon Chicago Co., 208 Ill. A. 171.
Story, etc., Piano Co. vs. Davy, 68 Ind. A. 150, 119 N. E. 177.
Carpenter vs. Carpenter, 45 Ind. 142.
Utterstrom vs. Kidder (Maine), 124 Atl. 725.
Mast vs. Strahan (Tex. Civ. A.), 225 S. W. 790.
Price vs. Furman, 37 Vt. 268, 65 Amd. 194.
Whitcomb vs. Joslyn, 51 Vt. 79.

Reynolds vs. Barber-Buick Co. (Mich.), 149 N. W. 985.
Tobin vs. Spann, 85 Ark. 556.
Ridgeway vs. Herbert, 150 Mo. 606.
Blake vs. Harding (Utah), 180 Pac. 172.
Bluejacket vs. Ewert, 265 Fed. 823.

In the case of *McCarthy vs. Henderson, supra*, the plaintiff (an infant) signed a conditional sale contract for a barge which he used in his business of operating a stage line. It was delivered upon the payment to the seller of $175.00, but about a month later the plaintiff offered to return the barge and demanded his money, which was refused by defendant. The Court said:

> "Defendants contend that plaintiff cannot recover the full sum paid by him, but that the defendants are entitled to deduct a reasonable compensation for the use of the barge while it was in his possession and use. It is clear that, if the plaintiff had made no advance, the defendants could not maintain an action against him for the use of the property. The contract, express or implied, to pay for the use is one he is incapable of making and his infancy would be a bar to such a suit. We cannot see how the defendants can avail themselves of, and enforce, by way of recoupment, a claim which they could not enforce by direct suit."

And in the case of *Whitcomb vs. Joslyn, supra*, the plaintiff, falsely representing himself to be of full age, bought a wagon under a conditional sale contract. After he had used the wagon until it had depreciated in a sum equal to the amount that he had paid, he made default in payment, and upon the defendant taking the wagon back under his contract the plaintiff sued for the return of the payments he had made on account. The Court said:

> "It is not controverted that all contracts entered into by an infant, except for necessaries, can be disaffirmed by him, and if executed, the money paid, or other property delivered thereon by him, recovered back, if he restore to the other party what he received therefor. In the case at bar, the defendant took possession of the wagon by virtue of the lien reserved thereon by him and his (the plaintiff's) right of recovery is not affected by the fact that the wagon depreciated in value while in his possession by reason of use or otherwise. The plaintiff is no more liable for the use of the wagon than for its agreed price; neither the wagon nor the use of the same, by anything appearing in the case, can be claimed to be necessary, for which he would be liable. *Price vs. Furman*, 27 Vt. 268."

In the case of *MacGreal vs. Taylor, supra*, money was borrowed by an infant, who executed a deed of trust upon an unimproved lot to secure the loan. Part of the money was used to pay off prior liens and taxes, and the balance was applied by her or under her directions in improving the lot. In considering this case the Supreme Court said:

> "If the money obtained from Mrs. Utermehle, the repayment of which was attempted to be secured by the deed of trust of October 22, 1889, had been paid directly to the infant, and, prior to the institution of this suit, had been all expended otherwise than in the improving of her lot the case would not be so difficult of solution; for it is well settled that it is not a condition of a disaffirmance of an infant of a contract made during infancy that he shall return the consideration received by him, if, prior to such disaffirmance and during infancy, the specific thing received has been disposed of, wasted or consumed and cannot be returned.

> If the minor when avoiding his contract has in his hands any of its fruits specifically, the act of avoiding a contract by which he acquires such property will divest him of all right to retain the same; and the other party may reclaim it."

In the case under consideration, as appears from the record, the specific consideration which passed to the infant plaintiff, namely, the automobile, was returned to or taken possession of by the defendant. Plaintiff has done all the law requires of him as a condition to the avoidance of his contract. And, had the infant plaintiff entirely destroyed the consideration (the automobile) could it be urged by defendant, in the face of the authority of *MacGreal vs. Taylor, supra*, that plaintiff's claim would be subject to set-off for the value of the consideration? Why, then, it may be asked, should the act of the infant in restoring to defendant that which is left of the consideration deprive him of a right which would exist if, instead of returning the consideration, he would entirely waste or destroy it?

Conclusion.

The whole purpose of the law is to protect the infant so that he cannot be made the victim of the influence and persuasion of the more mature and experienced adult. He is conclusively presumed to be incapable of judging as to the propriety or wisdom of contracting, and this incapacity on his part is not removed by reason of a mature appearance or a representation. The law must shield the infant; the defendant, and others in like position and circumstances, can be shielded by diligence and by reason of their mature

faculties and experience, and by means of a little inquiry or the asking of a few references—not only on financial ability, as is done when cars are sold on conditional sales contracts, but also on the age of the person when there is doubt enough to warrant the inquiry, which, in the case at bar, brought an answer that the infant was 24 years old.

For the reason stated and on the authorities above cited, it is respectfully submitted that the first and second questions of law ought to be answered in the negative.

Respectfully submitted,

GEORGE P. LEMM,
Attorney for Clarence H. Myers.

ENIED

Office Supreme Court, U. S.
FILED
OCT 4 1926
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

October Term, 1926

No. 65

CLARENCE H. MYERS

vs.

HURLEY MOTOR COMPANY, INC.

Motion to Require Entire Record to be Sent Up

ROGER J. WHITEFORD,
WALTER B. GUY,
HENRY C. CLARK,
Attorneys and Counsel for Hurley Motor Company, Inc.

(31,033)

(31,033)

Supreme Court of the United States

October Term, 1926

No. 65

CLARENCE H. MYERS

vs.

HURLEY MOTOR COMPANY INC.

MOTION TO REQUIRE ENTIRE RECORD TO BE SENT UP

Comes now Hurley Motor Co., Inc., by its undersigned Attorneys, and pursuant to Rule 34 of the Revised Rules of the Supreme Court of the United States, hereby makes application that this Court require the entire record in this cause to be sent up to this court by the Court of Apeals of the District of Columbia, and further, if considered proper by the court, that this court consider and decide the whole matter in controversy as upon writ of error or appeal.

Accompanying this application is certified copy of the entire record in the Court of Appeals of the District of Columbia.

The special reasons for this application are:

1. This suit was instituted as an action at law,

but defendant's pleas present equitable issues under statutes permitting equitable defenses. The correctness of the judgment of the trial court must be determined according to the principles of equity. The issues and facts which were before the trial court cannot be understood without the entire record.

2. This applicant, as defendant in the trial court, filed what according to the practice of that court were three pleas, all presenting equitable defenses. Two of these pleas presented affirmative defenses showing that plaintiff was indebted to the defendant in two distinct amounts, namely: $400.00 for use of the automobile and $525.96 for damages to the automobile because of its abuse by plaintiff. The statement of facts in the certificate of the Court of Appeals of the District of Columbia makes no mention of the claim for the $400.00. The correctness of this claim, in amount, is admitted in the agreed statement of facts presented to the trial court.

3. The amount of the judgment herein is $519.84 and not $525.96, as stated in the certificate before this court. The precise amount of this judgment is very important. Plaintiff sued for $406.12. Defendant claimed from plaintiff two sums, namely: $400.00 and $525.96. The trial court adjudged that defendant was entitled to each of these sums but that the $406.12 claimed by the plaintiff should be credited thereon. The precise amount of the judgment was arrived at as follows:

Claimed by defendant:

For use of automobile	$400.00
For damages to automobile	525.96
	$925.96
Against which was credited amount claimed by plaintiff	406.12
Judgment of trial court rendered for	$519.84

ROGER J. WHITEFORD
WALTER B. GUY
HENRY C. CLARK
Attorneys for Hurley Motor Co., Inc.

Consent is hereby noted to the granting of the above motion and to its presentation to the court on Monday, October 4, 1926.

GEORGE P. LEMM
Attorney for Clarence H. Myers

Office Supreme Court, U. S.
FILED
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CLERK

IN THE

Supreme Court of the United States

October Term, 1926

No. 65

CLARENCE H. MYERS

vs.

HURLEY MOTOR COMPANY, INC.

BRIEF FOR HURLEY MOTOR COMPANY, Inc.

and also

in Support of Motion to Require Entire Record to be Sent Up

ROGER J. WHITEFORD,
WALTER B. GUY,
HENRY C. CLARK,
Attorneys and Counsel for Hurley Motor Company, Inc.

(31,033)

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Supreme Court of the United States

October Term, 1926

No. 65

CLARENCE H. MYERS

vs.

HURLEY MOTOR COMPANY, INC.

BRIEF FOR HURLEY MOTOR COMPANY, Inc.

AND IN SUPPORT OF MOTION TO REQUIRE ENTIRE RECORD TO BE SENT UP

PRELIMINARY STATEMENT

This case has not appeared in any report. It has been certified to this court by the Court of Appeals of the District of Columbia on its own motion. The statement of facts contained in the certificate will of necessity constitute the statement of the case unless the motion to bring up the entire record be granted.

This brief is prepared in support of the motion of Hurley Motor Company, Inc., to require the entire record to be sent up. The argument in support of the motion is co-extensive with the argument on the merits of the case.

Clarence H. Myers was plaintiff and Hurley Motor Company, Inc., was defendant in the trial court. The parties will be so designated in this brief.

STATEMENT OF FACTS UNDER MOTION TO BRING UP ENTIRE RECORD

As pointed out in our motion to bring up the entire record, the statement of facts contained in the certificate of the Court of Appeals of the District of Columbia is inadequate for an understanding of the issues herein.

An agreed statement of facts was filed in the trial court as follows:

> "That the plaintiff, on the 28th day of April, 1923, being then a minor of the age of 20 years, in so far as he was able contracted with the defendant for the sale by said defendant to him of a Hudson touring car for the price of $650, upon terms set out in conditional sales contract signed by plaintiff, copy of which is attached to plaintiff's affidavit; plaintiff turned over to defendant in part payment for said Hudson automobile a 1922 Ford touring car and was allowed by defendant a credit of $250, therefor; that plaintiff subsequently made monthly payments aggregating $156.12, making a total of $406.12 paid by plaintiff to defendant on said purchase price of $650; that, plaintiff being in arrears of payments agreed upon on account of the purchase of said Hudson automobile, defendant repossessed itself thereof on the 3d day of October, 1923, the plaintiff being at said time a minor; plaintiff attained the age of twenty-one years on October 21, 1923, and on or about the 1st day of November, 1923, demanded of the defendant that it return to him the sum of $250, which it had realized from the sale of the Ford touring car which had been turned over to defendant by plaintiff and the amount for which he was given credit by defendant therefor, together with the sum of $156.12 paid by plaintiff to defendant as aforesaid, which demand was refused; that, at the time of the purchase by plaintiff from defendant of said Hudson automobile he

> represented to defendant's agent that he was twenty-four years; that he was engaged in the hacking business and needed and required said Hudson automobile for his business; that when said automobile was repossessed by defendant, it was in badly damaged condition and defendant was compelled to expend in restoring said automobile to same condition it was in at time of purchase by plaintiff the sum of $525.96, and that, by reason of the use by plaintiff, was depreciated to that extent; that plaintiff used said automobile in hacking business from the 28th day of April, 1923, until the 3d day of October, 1923, and that the reasonable value of the use of said automobile during said time is $400.00."

This suit was instituted in the Municipal Court of the District of Columbia and since the amount claimed by plaintiff was less than $500, formal pleadings were not required. Plaintiff filed what is known as an "Affidavit of Merit" claiming $406.12 from the defendant. Defendant filed its "Affidavit of Defense" asserting that plaintiff could not recover because of his fraudulent misrepresentation of his age as an inducement to obtaining the automobile from defendant, and that defendant had lost $525.96 in damages to the automobile occasioned by plaintiff's abusive use and had also lost the use of the automobile for more than five months, which use was reasonably worth $400. Defendant filed two additional pleas, in one claiming said $525.96 from plaintiff, and in the other claiming said $400 from plaintiff. Defendant's "Affidavit of Defense" and pleas present equitable defenses which are authorized by statute.

The trial court entered judgment in defendant's favor for $519.84. Obviously the amount of this judgment was arrived at as follows:

Claimed by defendant:	
For use of automobile	$400.00
For damages to automobile	525.96
	$925.96
Against which was credited amount claimed by plaintiff	406.12
Judgment of trial court rendered for	$519.84

ARGUMENT

I

PRINCIPLES OF EQUITY CONTROL THIS CASE

A. PLAINTIFF'S ACTION MUST BE BASED ON EQUITY AND GOOD CONSCIENCE.

Plaintiff, knowing that through fraudulent misrepresentation of his age he had induced the defendant to contract for the sale to him of an automobile, nevertheless, upon becoming of age, undertook to disaffirm his purchase. Plaintiff then sued to recover the full value of his credits on the purchase price of the automobile. The action is in *indebitatus assumpsit*, upon a quasi-contract *(Williston on Contracts, Section 240)*.

An action on quasi-contract presupposes that the defendant has money which *ex aequo et bono* the plaintiff should recover. This is clearly stated in *Cary vs. Curtis*, 3 How. 236, 246-247, 11 L. Ed. 576, 582:

> "The action of *assumpsit* for money had and received, it is said by Lord Mansfield (Burr., 1012, *Moses v. Macfarlen,*) will lie in general whenever the defendant has received money which is the

property of the plaintiff, and which the defendant is obliged by the ties of natural justice and equity to refund. And by Buller, Justice, in *Stratton v. Rastall* (2. T. R., 370), 'that this action has been of late years extended on the principle of its being considered like a bill in equity. And, therefore, in order to recover money in this form of action the party must show that he has equity and conscience on his side, and could recover in a court of equity.' These are the general grounds of the action as given from high authority. There must be room for implication as between the parties to the action, and the recovery must be *ex aequo et bono*, or it can never be. If the action is to depend on the principles laid down by these judges, and especially by Buller, a case of hardship merely could scarcely be founded upon them; much less could one of injustice or oppression, nor even one which arose from irregularity or indiscretion in the plaintiff's own conduct."

So in *Wilhelm vs. Hardman*, 13 Md. 140, an infant who had agreed to work for a farmer in return for his board, clothing and the opportunity of attending school, was held not to be entitled after performance to disaffirm the agreement and assert that the farmer owed for the services of the infant. The court stated that to allow recovery would be a fraud and imposition by the infant.

In *Valentini vs. Canali*, Law Reports, 21 Queen's Bench Division, 167, an infant undertook to disaffirm a contract to rent a house and sued in *assumpsit* to recover the money paid under the agreement. The following quotation from the opinion shows the ruling of the court:

"Under the contract in question, which was one for his advantage, the plaintiff, an infant, undertook to pay the defendant a sum of money. He paid the defendant part of this sum, and gave him a promissory note for the balance. The judge

satisfied himself that the plaintiff was an infant at the time when he entered into the contract, and having satisfied himself of this, did, in my opinion, justice according to law. He set aside the contract, and he ordered the promissory note to be cancelled.

"It is now contended that, in addition to this relief, the plaintiff was entitled to an order for the re-payment of the sum paid by him to the defendant as money paid under a contract declared to be void. No doubt the words of s. 1 of the *Infants' Relief Act, 1874*, are strong and general, but a reasonable construction ought to be put upon them. The construction which has been contended for on behalf of the plaintiff would involve a violation of natural justice. When an infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover back the money which he has paid. Here the infant plaintiff who claimed to recover back the money which he had paid to the defendant had had the use of a quantity of furniture for some months. He could not give back this benefit or replace the defendant in the position in which he was before the contract. The object of the statute would seem to have been to restore the law for the protection of infants upon which judicial decisions were considered to have imposed qualifications. The legislature never intended in making provisions for this purpose to sanction a cruel injustice. The defendant therefore could not be called upon to repay the money paid to him by the plaintiff, and the decision appealed against is right."

The full report of *Stansbury vs. Marks*, 4 Dall. 130, 1 L. Ed. 771, is as follows:

"Case. Plea. *Non Assumpsit.* The defendant offered to give infancy in evidence on this plea; to which the plaintiff objected. But

"By the Court:—The evidence is clearly admissible. Under the general issue, however, the jury may decide, whether the evidence is sufficient

> to discharge him, or not. The position is generally true, that an infant can only bind himself for necessaries; yet, in the court of chancery, cases occur, in which a payment would be decreed, contrary to the strict rule of the common law. In this form of action, equity is the principal consideration; and from necessity the courts of law, in Pennsylvania, adopt the principles of the English courts of chancery."

B. DEFENDANT INVOKES EQUITABLE DEFENSES.

By *the Act of March 4, 1923, (42 Stat. 1506)* equitable defenses are permitted in actions at law in the Municipal Court of the District of Columbia. This Act reads:

> "That hereafter section 1535c of the Code of Law for the District of Columbia, permitting equitable defenses to be interposed in actions at law, shall be applicable to proceedings now pending in the Municipal Court of the District of Columbia as well as to actions hereafter brought in said court."

Section 1535c of the Code of Laws of the District of Columbia reads:

> "Sec. 1535c. EQUITABLE DEFENSES AT LAW.—In all actions at law equitable defenses may be interposed by plea or replication."

By *Section 11 of the Act of March 3, 1921,* (41 Stat. 1310), which enlarged the jurisdiction of the Municipal Court, that court is empowered "to make rules of practice, pleading and procedure".

Pursuant to this authority the Municipal Court promulgated its *Rules of Practice.* In *Section 2 of Rule 2,* it is provided:

> "Every suit claiming more than $500 exclusive of interest and costs, shall come under Class A in

these rules. All other suits shall come under Class B. In the absence of special mention all rules shall apply to both classes."

Section 3 of Rule 2 provides:

> "In cases of Class A, a declaration shall be filed similar to that required in the Supreme Court of the District of Columbia. In cases of Class B, no formal pleadings shall be required but no suit shall be filed until the plaintiff shall deliver to the Clerk a bill of particulars of his claim (facts stated in an affidavit of merit not to serve as such bill of particulars), together with a copy thereof for each defendant, which bill of particulars, if the suit be upon a contract, express or implied, shall consist of an itemized statement of the account or of the nature of the demand, or, if the suit be for a tort, it shall consist of a brief statement of the nature of the tort, and such further information as will reasonably inform the defendant of the nature of the case he is called upon to defend. If the bill of particulars be held by the court to be insufficient, leave may be granted to amend the same."

This case is therefore known as a Class B case in which formal pleadings are not required.

Section 1 of Rule 16 of the Rules of the Municipal Court governs the presentation of defenses in actions *ex contractu*, and among other things provides:

> "In any action arising *ex contractu*, if the plaintiff or his agent shall have filed, at the time of bringing his action, an affidavit setting out distinctly his cause of action, and the sum he claims to be due, exclusive of all set-offs and just grounds of defense, and the defendant shall have been served with a copy of said affidavit and in Class A suits with a copy of the declaration and affidavit, the plaintiff shall be entitled to a judgment for the amount so claimed, with interest and costs, unless the defendant shall file on the return day

> of the summons or such additional time as shall be fixed by the court, an affidavit of defense, denying the right of the plaintiff as to the whole or some specified part of his claim, and specifically stating also, in precise and distinct terms, the grounds of his defense, which must be such as would, if true, be sufficient to defeat the plaintiff's claim in whole or in part."

The pleadings meet all the foregoing statutes and rules of the court. The case was determined by the trial court according to equitable principles.

The effect of an equitable plea in a law action is thus described by Roscoe Pound:

> "V. The equitable principle of complete disposition of the entire controversy between the parties should be extended to its fullest extent and applied to every type of proceeding.
>
> "To give effect to this principle four propositions may be suggested:
>
> "(1) The Courts should have power and it should be their duty in every sort of cause or proceeding to grant any relief or allow any defense or cross-demand which the facts shown and the substantive law may require."

Quotation taken from *10, American Bar Association Journal, 468.*

The ability of a court under an equitable plea to dispose of the whole controversy in a single suit is stressed by a *Report of the House Judiciary Committee* supporting the 1915 amendment to the Federal Judicial Code, which amendment authorized equitable pleas in federal courts generally. *10 Am. Bar Assn. Jour. 469.*

An able article entitled *"Federal Practice as to Equitable Defenses in Actions at Law", by Thomas B. Adams,* is found in *10 American Bar Association Journal, 467.*

In *Dushane vs. Benedict*, 120 U. S. 630, 643, 30 L. Ed. 810-813, this court treats of equitable defenses in law actions and quotes from the Pennsylvania Supreme Court with approval as follows:

> "Certainly the plaintiff has no right to complain if the whole business is settled at once. What he is not in good conscience entitled to receive, he should not be permitted to receive."

In *Greene vs. Louisville & I. R. Co.* 244 U. S., 499, 520, 61 L. Ed. 1280, 1291, it is said:

> "It is a familiar maxim that 'a court of equity ought to do justice completely, and not by halves;' and to this end, having properly acquired jurisdiction of a cause for any purpose, it should dispose of the entire controversy and its incidents, and not remit any part of it to a court of law. *Camp v. Boyd*, 229 U. S. 530, 551, 552, 57 L. Ed. 1317, 1326, 1327, 33 Sup. Ct. Rep. 785; *McGowan v. Parish*, 237 U. S. 285, 296, 59 L. ed. 955, 963, 35 Sup. Ct. Rep. 543."

We submit the pertinency of the following comment upon an equitable plea in a law action: "It would not be consistent with equity and good conscience for plaintiff to enforce the claim asserted by this suit." *Ford vs. Huff*, 269, Fed. 652, 657 (Aff. 266 U. S. 602, 69 L. Ed. 462).

C. RIGHT AND JUSTICE TO CONTROL.

By *Section 954 of the Revised Statutes*, the Courts of the United States are authorized and directed to administer justice so as to prevent hardship and to "give judgment according as the right of the cause and matter in law shall appear to it".

This power permits a record before an Appellate Court to be amended in accordance with the true state

of facts and to meet the ends of justice. *Norton vs. Larney*, 266 U. S. 511, 69 L. Ed. 413.

This power was declared in slightly different form by *the Act of February 26, 1919* (40 Stat. 1181) which provides:

> "That section two hundred and sixty-nine of the Act approved March third, nineteen hundred and eleven, entitled 'An Act to codify, revise, and amend the laws relating to the judiciary,' be, and the same is hereby, amended to read as follows:
> " '*Sec. 269.* All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties'."

The latter act was applied in an action involving equitable defenses in *Liberty Oil Company vs. Condon National Bank*, 260 U. S. 235, 67 L. Ed. 232.

II

INFANCY AN EQUITABLE SHIELD WHICH MAY BE LOST BY UNCONSCIONABLE CONDUCT

The early common law premised the limitation of capacity of an infant upon the principle that "the infant must get his property at his majority as it was left to him". *W. S. Holdsworth, A History of English Law, 3rd edition, Vol. III, p. 513.*

This principle, by experience, was found unsatisfactory and archaic. "The question of the legal cap-

acity of an infant must always be a difficult one. It is impossible—especially when the age of majority is 21—to deny him all capacity. Equally it would be obviously unfair to the infant to treat him as a full-grown man. Where and how is the line to be drawn?" *Holdsworth, id. 513.*

"The fact that the later law of infancy and guardianship has been constructed from the piecing together of a mass of exceptions to an archaic principle has, more than any other single cause, rendered it difficult and obscure." *Holdsworth, id. 514.*

The haphazard distinctions met with in this connection, and the lack of underlying reason, are illustrated by the difference made by the English courts between the exercise by an infant of a power in gross reposed in him over personalty on the one hand, and over realty on the other hand. In the latter case it is considered that the infant has a proprietary interest to be protected, and therefore lacks capacity to exercise the power, although it is held that an infant may exercise such a power over personalty. Of this distinction, Jessel, M. R., said: "The reason, if reason is to be found anywhere, seems to be this — that it requires more discretion to dispose of your own property than to dispose of other peoples'." *Holdsworth, id. Vol. VII, p. 182, note.*

"It is when we come to attempted activities on the part of the infant, such as the alienation or letting of his property, the purchasing of goods, the receipt of money on behalf of another, or the detention of another's property, that doubts begin. * * * This disability was in many cases by no mans for the advantage of the infant." *Holdsworth, id., Vol. III, p. 517.*

Equity, through the doctrine of *parens patriae*, undertook to relieve against the difficulties which resulted

from undue limitation of the capacity of an infant. *Holdsworth, id. Vol. VI, p. 648.* This took the form of authorizing transactions through guardians, which disposed of the infant's property, and also of upholding acts of the infant which equity would have required him to perform. In *Tucker vs. Moreland,* 10 Pet. 58, 67, 9 L. Ed. 349, speaking through Mr. Justice Story, this court said:

> "It was precisely such an act as the infant was bound to do; and would have been compelled to do by a court of equity, as a trustee of the mortgagor. And certainly it was for his interest to do what a court of equity would by a suit have compelled him to do."

Infants are not enveloped in absolute incapacity. They are not exempted from all responsibility. Rather they are possessed of imperfect or incomplete capacity. In Roman law there were developed three degrees of capacity as applied to infants: "Total absence of capacity, partial absence of capacity, full capacity". *Sohm's Institute of Roman Law, Ledlie's translation, 3rd Edition, 216.* This is a necessary classification. No mesmeric change in fact occurs on one's twenty-first birthday, whereby absolute incapacity becomes full capacity. There is, in fact, a transition period. An infant is not a lunatic stripped of intelligence. The mentality of an infant is constantly on the increase.

So we find *Blackstone, in Volume I, page 463, of his Commentaries,* saying:

> "A male at *twelve* years old may take the oath of allegiance; at *fourteen* is at years of discretion, and therefore may consent or disagree to marriage, may choose his guardian, and, if his discretion be actually proved, may make his testament of his personal estate; at *seventeen* may be

> an executor; and at *twenty-one* is at his own disposal, and may alien his lands, goods and chattels. A female also at *seven* years of age may be betrothed or given in marriage; at *nine* is entitled to dower; at *twelve* is at years of maturity, and therefore may consent or disagree to marriage, and, if proved to have sufficient discretion, may bequeath her personal estate; at *fourteen* is at years of legal discretion, and may choose a guardian; at *seventeen* may be executrix; and at *twenty-one* may dispose of herself and her lands."

Chancellor Kent presents a similar review of acts which an infant has capacity to do. *II, Kent's Comm. 242.*

An infant's capacity and consequent responsibility for crime arises from facts and necessity, as pointed out in *I Hale's Pleas of the Crown, 25:*

> "Experience makes us know, that every day murders, bloodshed, burglaries, larcenies, burning of houses, rapes, clipping and counterfeiting of money, are committed by youths above fourteen and under twenty-one; and if they should have impunity by the privilege of such their minority no man's life or estate could be safe." (Quotation taken from *Holdsworth, id. Vol. VIII, p. 438, note 3.*)

The maxim *malitia supplet aetatem* applies not only to criminal *(Allen vs. U. S.*, 150 U. S. 551, 558, 37 L. Ed. 1179, 1182,) but also to delictual responsibility of an infant. In *Spillane vs. Missouri Pacific Railway Company*, 135 Mo. 414, 426, 37 S. W. 198, 58 Am. St. Rep. 580, we find the following:

> "In cases of felonies by infants *malitia supplet aetatem*, because notwithstanding the law presumes an infant between the age of seven and fourteen years *doli incapax* yet this *prima facie* case of incapacity may be overcome by proof, and, if it is, the infant is amenable to punishment just as an adult, and in civil actions by the infant for

> damages when the intelligence, experinece, and capacity of the infant is shown to be commensurate with that of an adult and there is no conflict as to his capacity, no reason appears why this intelligence and experience should not supply the lack of age nor why a court should not declare his responsibility as a question of law."

In *Hawk vs. Harmon*, 5 Binn, (Pa.) 43, 45, the court announces:

> "There is no maxim better established in law, or more congenial to the common understanding of mankind, than that every person of sound mind and discretion, should be responsible for what he says or does injurious to others. Even an infant of the age of seventeen years, who in general is protected by the laws, is liable for slanderous words spoken by him; because *malitia supplet aetatem. Noy. 129.*"

"The care and caution required of a child is according to his maturity and capacity." *Sioux City and Pacific R. R. Co. vs. Stout*, 17 Wall, 657, 660, 21 L. Ed. 745, 748. *Baltimore & Potomac R. R. Co. vs. Cumberland*, 176 U. S. 232, 44 L. Ed. 447.

An infant's imperfect capacity may become complete through emancipation by marriage. *Del. L. & W. R. Co. vs. Petrowsky*, 250 Fed. 554, 162 C. C. A. 570.

An infant of tender age may have sufficient "capacity and intelligence" to be competent as a witness. *Wheeler vs. United States*, 159 U. S. 523, 524, 40 L. Ed. 244, 247.

It has recently been held that an infant defrauded into making a loan to a bankrupt must, like other creditors, return a preference which he has received. *Cunningham vs. Brown*, 265 U. S. 1, 68 L. Ed. 873.

The law is zealous to protect an infant against injustice. It gives him a shield. This shield is a weapon

of defense. It is not a sword or weapon of offense. The privilege of infancy is not a privilege to cheat civilly any more than to cheat criminally. The law does not turn loose an infant unrestrained to prey upon society. It protects an infant against overreaching, but the shield of the law is not an instrument to be used by the infant in overreaching. As said in *MacGreal vs. Taylor*, 167 U. S. 688, 801, 42 L. Ed. 333, the privilege of infancy is not "a sword to be used to the injury of others;" "the law intends it simply as a shield to protect the infant from injury and wrong". Chancellor Kent states: "Infancy is not permitted to protect fraudulent acts." *II, Kent's Comm. 240.*

In *Pomeroy's Equity Jurisprudence*, Section 945, the law is thus stated:

> "The incapacity of infants to enter into binding contracts is the same in equity as in law; but such contracts are generally voidable only, and may therefore be ratified after the infant attains his majority. Fraud, however, will prevent the disability of infancy from being made available in equity. If an infant procures an agreement to be made through false and fraudulent representations that he is of age, a court of equity will enforce his liability as though he were an adult, and may cancel a conveyance or executed contract obtained by fraud."

As far back as 1838, we find the Supreme Court of New Hampshire imposing responsibility upon an infant for fraudulent misrepresentation of his age as an inducement to a contract. We quote from the opinion in *Fitts vs. Hall*, 9 N. H. 441, 449:

> The representation "in the present case that the defendant was of full age, was not part of the contract, nor did it grow out of the contract, or

in any way result from it. It is not any part of its terms nor was it the consideration upon which the contract was founded. No contract was made about the defendant's age. The sale of the goods was not a consideration for this affirmation or representation. The representation was not a foundation for an action of assumpsit. The matter arises purely *ex delicto*. The fraud was intended to induce, and did induce, the plaintiff to make a contract for the sale of the hats, but that by no means makes it part and parcel of the contract. It was antecedent to the contract; and if an infant is liable for a positive wrong connected with a contract, but arising after the contract has been made, he may well be answerable for one committed before the contract was entered into, although it may have led to the contract."

"In *Bac. Abr. Infancy* I 3, it is said: 'Also, it seems, that if an infant, being above the age of discretion, be guilty of any fraud in affirming himself to be of full age, or if, by combination with his guardian, etc., he make any contract or agreement, with an intent afterwards to elude it by reason of his privilege of infancy, that a court of equity will deem it good against him according to the circumstances of the fraud.' *3 Gwillim's Bac. 604.*"

The Supreme Court of Texas, in 1856, in *Kilgore vs. Jordan*, 17 Tex. 341, 350-351, follows the New Hampshire rule and, in an able opinion, reviews the authorities and states the reasons for the decision.

In 1863, in *Eckstein vs. Frank*, 1 Daly, 334, the New York court followed the New Hampshire doctrine and, in its opinion, included the following quotation from Lord Chancellor Cowper:

"If an infant is old and cunning enough to contrive and carry out a fraud, he ought to make satisfaction for it."

The Court also declared that the good sense and justice of this rule was as applicable in a court of law as in a court of equity.

In 1879, the New Hampshire court emphatically reaffirmed its position, stating, in *Hall vs. Butterfield*, 59 N. H. 354, 359, that the rule of that court respecting infants "prevents their disability from being 'not their protection merely, but an extraordinary legal ability to rob others; not a shield, but a sword; not a mere legal incapacity to be plundered by their fellow men, but a vast capacity to plunder them with impunity'."

The Chancery Court of New Jersey (1885) in *Parker vs. Hayes*, 39 N. J. Eq. 469, 478, emphatically announced a similar doctrine, basing the rule upon its manifest justice and declaring that "infants have no privilege to cheat men".

One of the most thorough discussions of an infant's responsibility for a fradulent misrepresentation of his age is found in *Rice vs. Boyer* (1886), 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53. The Court points out "the stubborn conflict in the authorities"; that an infant's responsibility for fraudulent misrepresentation is not only criminal but also delictual, and concludes its opinion as follows:

> "Any other rule would in many cases suffer a person guilty of positive fraud to escape loss, although his fraud had enabled him to secure and make way with the property of one who had trusted in good faith to his representation, and had exercised due care and diligence. We are unwilling to sanction any rule which will enable an infant who has obtained the property of another, by falsely representing himself to be of full age, to enjoy the fruits of his fraud, either by keeping the property himself or selling it to another, and when asked to pay its just and reasonable value, successfully plead his infancy. Such a rule would make the defense of infancy both a shield and a sword, and this is a result which the principles of justice forbid, for they require that it should be merely a shield of defense."

In *Commander vs. Brazil* (1906) 88 Miss. 668, 41 So. 497, after referring to the "hopeless conflict of authorities", the Court continues:

> "It may be stated that the great weight of earlier authorities on this subject hold that a minor cannot be held liable on his contract, but the tendency of all modern text books and decisions is in favor of holding a minor responsible under his contract, where he deliberately makes a false representation as to his age, and in this way induces another to contract with him and accepts the benefits of the contract. Whatever may be the weight of earlier authorities on this subject, common justice outweighs the unsatisfactory distinctions attempted to be set up as reason why a minor should not be held liable under these circumstances. * * * It matters not in what court the suit may be brought or what the form of the action, the thing done is the subjecting of the minor's property to the payment of an obligation that his fraudulent conduct has created."

In *Commonwealth vs. Ferguson* (1909) 135 Ky. 32, 39, 121 S. W. 967, 24 L.R.A.N. S., 1101, 21 Ann. Cas. 434, the court deals with the criminal responsibility of an infant and states:

> "The infant of mature years is placed on the same footing as the adult. If an infant by falsely and fraudulently representing that he is the son of A, when in fact he is not, and this is unknown to C, who on the faith of his statement advances him money which he would not have done had he known the truth, he is guilty of the offense denounced; and so an infant who appears and represents himself to be of age, or makes any other false and fraudulent statement upon the faith and credit of which he obtains money or property, is equally guilty."

In *Barr vs. Packard Motor Car Company* (1914), 182 Mich. 612, 148 N. W. 761, a bill in equity was filed by

an infant to vacate a judgment at law, contending that infancy without more rendered a consent judgment at law voidable, and that the infant had elected to avoid it. The court declined to vacate the judgment in the absence of any showing that the infant had been overreached or any injustice done.

In *LaRosa vs. Nichols* (1918) 92 N.J.L., 375, 380, 105 Atl. 201, the Court of Errors and Appeals of New Jersey announced:

> "As applied to the facts in the case at bar, the law, as I view it, is that if a youth under twenty-one years of age, by fully representing himself to be an adult, which he appears to be, for the purpose of inducing another to enter into a contract with him, and, thereby, through such representation and appearance the other party is led to believe that such infant is an adult, and makes a contract with him, the benefit of which he obtains and retains, then, in a suit on that contract, the minor will not be permitted to set up the privilege of infancy, because by his fraudulent conduct he has estopped himself from so pleading; and this in a court of law as well as in a court of equity."

In *Carmen vs. Fox Film Corporation* (1920), 269 Fed. 928, 15 A.L.R. 1209, the decision, as set forth in the head note, was as follows:

> "When about twenty years of age complainant contracted her services as a motion picture actress to defendants for a term, including options for renewal, of some four years. A few months later, while still under twenty-one, representing herself free to do so, she made contracts with another for her services covering the same time. *Held* that whether or not as matter of law, she might avoid her contracts with defendant on the ground of her minority, her conduct was such that a court of equity would grant her no relief against them."

On February 28, 1921, this Court declined to grant a writ of certiorari in the last cited case. *Carmen vs. Fox Film Corporation*, 255 U. S. 569, 65 L. Ed. 790.

Speaking of such false representations, Professor *Williston*, in his work on *Contracts*, Section 245, states:

> "The sounder view, however, is that the infant is liable. It is conceded in all the cases that the infant is as a rule liable for his torts and there is no valid reason why he should not be liable for false and fraudulent representations as fully as for other torts, nor if he is in general liable for his deceits is there any reason to distinguish the case where the injurious consequence of the deceit is entering into an uninforceable contract from cases where the injurious consequences are of a different nature. The reasoning generally given in cases which protect the infant, 'that infants are liable for their torts, yet the form of action does not determine their liability, and they cannot be made liable when the cause of action arises from a contract, although the form is *ex delicto*,' does not meet the difficulty. The infant is not held liable on his contract either in form or substance if he is held liable for deceit."

We are dealing not with an innocent infant, or one who has been imposed upon, but with an infant admittedly guilty of positive fraud. This distinction is as clear and marked as the difference between sunlight and darkness. Nothing is offered in mitigation of the fraud. The only response by the infant is his attempt arbitrarily to hide behind his few-months' minority, a brazen attempt to use the privilege afforded for his protection as a sharp sword of iniquity. We submit that, in the year 1926, this Court will recognize the progress and development, which is conspicuous in the genius of our law, and not place its stamp of approval upon an anachronism equally beyond the pale of fact and of morals.

Our contention is not inconsistent with prior decisions of this court. The cases referred to are:

Tucker vs. Moreland (1836), 10 Peters, 58, 9 L. Ed. 345;

Sims vs. Everhardt (1880), 102 U. S., 300, 26 L. Ed. 87;

MacGrael vs. Taylor (1897), 167 U. S., 688, 42 L. Ed. 326.

In each of these cases we have an innocent infant. Whatever may be said in the opinions is therefore *obiter* as applied to an infant of discretion guilty of positive fraud. It was in *Tucker vs. Moreland, supra,* that the Court said:

> "It was precisely such an act as the infant was bound to do; and would have been compelled to do by a court of equity, as a trustee of the mortgagor. And certainly it was for his interest to do what a court of equity would by a suit have compelled him to do."

The infant in *Sims vs. Everhardt, supra,* was compelled by the clear duress of her husband to excute a deed. Her statement at the time that she was of age was equally the result of this same duress. The innocence of the infant is conspicuous throughout the opinion, which stresses the fact that her actions did not result from "a free mind". Further, not only is the statement in the opinion, that the authorities are uniform in prohibiting an estoppel in pais against an infant, *obiter,* but this statement was hastily made and overlooked the prior cases of:

Fitts vs. Hall, (1838) 9 N. H. 441, 442;

Kilgore vs. Jordan (1856) 17 Tex. 341, 350-351;

Eckstein vs. Frank (1863) 1 Daly, 334;

Hall vs. Butterfield (1879) 59 N. H. 354, 359.

Commenting on this case, and evidently intending to

caution its too extended application, in *MacGrael vs. Taylor, supra,* (p. 698) this court said:

> "It may be observed that the Court did not decide in that case that Mrs. Sims was entitled to the land without accounting to the estate of Mrs. Everhardt for the purchase money and for the amount paid in order to discharge the mortgage debt upon it."

So in *MacGrael vs. Taylor, supra,* we find the court (p. 694) pointing out particularly, as one of the pertinent facts, that the transaction under consideration "was made in good faith on each side." "No inquiry was made as to her age, nor did she make any representation on that subject". And yet this innocent infant was required to account for the money received, although it had been expended in improving her property. Said the court (p. 701):

> "To say that the consideration paid to Mrs. MacGrael for the deed of trust of 1889 is not in her hands, when the money has been put into her property in conformity with the disaffirmed contract, and notwithstanding such property is still held and enjoyed by her, is to sacrifice substance to form, and to make the privilege of infancy a sword to be used to the injury of others, although the law intends it simply as a shield to protect the infant from injustice and wrong."

This court not only recognized, but placed its approval upon the distinction between an innocent infant and one guilty of positive fraud, at the time it denied the application for certiorari in *Carmen vs. Fox Film Corporation,* 255 U. S., 569, 65 L. Ed. 790. This was in 1921. This ruling also held the infant responsible for her fraud. See statement of this case at page 20 of this brief.

III

FINDINGS OF TRIAL JUDGE CORRECT

The trial judge sat as both judge and jury. He heard the evidence, measured the damage resulting from the fraud, and made his finding accordingly. This finding was upon all the issues presented. As was said in *Hall v. Butterfield*, 59 N. H. 354, 359:

> "The question whether the infant has received a benefit,—like the question of what are necessaries, and what sum the infant ought to pay for them, or the question of negligence or ordinary care, and other similar questions,—is one of mixed law and fact."

In this connection see also the case of *Stansbury v. Marks*, 4 Dall. 130, 1 L. Ed. 771, which case is quoted at page 6 of this brief.

The fact that the infant obtained posession of the goods through a supposed contract, does not excuse his tortious abuse of the goods. *Vasse v. Smith*, 6 Cranch, 226, 3 L. Ed. 207.

The automobile when received back by defendant was not only deteriorated by months of use, but also had been very greatly damaged by reason of plaintiff's hard and abusive use. The defendant's loss occasioned by plaintiff's fraud was the value of the use of the car for all these months *plus* the cost of making good the damage which plaintiff's abuse had caused.

In *McRae v. Lonsby*, 130 Fed. 17, 64 C. C. A. 385 (Lurton, J. participating) the defendant had been induced to contract for the purchase of a sunken vessel through plaintiff's fraud and had incurred expense in endeavoring to raise the vessel before the fraud was discovered. It was held that defendant was entitled

to rescind the contract and recover back not only the consideration paid, but also the moneys so expended on account of the purchase.

Deterioration of personal property is a proper element of damage.

Shotwell v. Wendover, 1 Johns (N. Y.) 65

Muenster v. Fields, 89 Tex. 102-33 S.W. 852

Western Land & Cattle Co. v. Hall, 33 Fed. 236.

The Amiable Nancy, 3 Wheat. 546, 4 L. Ed. 456.

The case of *Eaton v. Hill*, 50 N. H. 235, 239, 9 Am. Rep. 189, may be epitomized by the following quotation therefrom:

> "We think, then, that the doctrine is well established, that an infant bailee of a horse is liable for any positive and willful tort done to the animal distinct from a mere breach of contract,—if, by driving to a place other than the one for which he is hired, refusing to return him when demanded after the time has expired, willfully beating him to death, and the like; so, if he wilfully and intentionally drive him at such an immoderate speed as to seriously endanger his life, knowing that it will do so."

Under a similar situation in *Towne v. Wiley*, 23 Ver. 355, 360-361, 56 Am. Dec. 85, we find Redfield, J., saying:

> "This is no hardship; for the infant as well knows, that he is perpetrating a positive and substantial wrong, when he hires a horse for one purpose and puts him to another, as he does, when he takes another's property by way of trespass."

Continuing and referring to the case of *Fitts v. Hall*, 9 N. H. 441, Justice Redfield said:

> "For one, I must say, I like the truthfulness and firmness evinced in the decision. It seems

> to be a case far more worthy of respect, than that class of cases, where the courts have shown so much solicitude to give the infant the benefit of my Lord Mansfield's shield, that they have allowed him sometimes to use his privilege as a weapon of offense also. The case of *Vasse v. Smith*, 6 Cranch 226, goes much farther than it is needful to go, to make the defendant liable in the present case, and yet no farther than sound policy and a proper regard for fair dealing would seem to require. *Campbell v. Stakes*, 2 Wend. 137, is a full authority for the plaintiff, in the present case, and, if no case in point were produced, it seems to us, upon general principles, the plaintiff is entitled to retain his verdict."

Other cases to the same point are:

Moore v. Eastman, 1 Hun. (N. Y.) 578

Freeman v. Boland, 14 R. I. 39, 51 Am. Rep. 340

Churchill v. White, 58 Neb. 22, 78 N. W. 369, 76 Am. St. Rep. 64.

We recognize that under many authorities an infant generally may avoid his purchases without restoring the consideration received by him. *Williston on Contracts, Section 238.* Professor Williston points out the hardship of this rule and states his own conclusion as follows:

> "It must be admitted that the prevailing rule allowing an infant to rescind an executed transaction without restoring what he has received may often work gross injustice. A few instances of this are suggested in a Minnesota case. 'Suppose a minor engaged in agriculture should hire a man to work on his farm, and pay him reasonable wages for his services. According to this rule the minor might recover back what he had paid, although retaining and enjoying the fruits of the other man's labor. Or, again, suppose a man engaged in mercantile business with a capital of $5,000 should, from time to time buy and pay for

> $100,000 worth of goods, in the aggregate, which he had sold, and had got his pay. According to this doctrine, he could recover back the $100,000 which he had paid to the various parties from whom he had bought the goods.' The injustice of such results so far as the adult is concerned is not diminshed by the fact that the infant has previously wasted the consideration which he received from the adult.
>
> "In Minnesota and New Hampshire the ordinary rule prevailing in regard to necessaries has been extended so far as to hold an infant bound by his contracts, where he fails to restore what he has received under them, to the extent of the benefit actually derived by him from what he has received from the other party to the transaction. This seems to offer a flexible rule which will prevent imposition upon the infant and also tend to prevent the infant from imposing to any serious degree upon others."

Probably the leading case which is most nearly in point is *Rice v. Butler*, 160 N. Y. 578, 55 N. E. 275, 47 L.R.A. 303, 73 Am. St. Rep. 703. This case is referred to in the subsequent case of *Sparandera v. Staten Island Garage*, 193 N.Y.S. 392, 396. In the latter case the plaintiff had undertaken to purchase, when over twenty years of age, a Ford Runabout from the defendant which he used for a period of five months. Upon attaining his majority the plaintiff sued to recover back the moneys paid to the defendant. Said the court:

> "As the plaintiff has received the benefit of the contract, having had the use of the property in question, during a period of five months, he must, in view of the doctrine now well recognized in this state, account for its reasonable use or deterioration in value. Otherwise, he would be making the use of the privilege of infancy as a sword, and not as a shield, *In the absence of wanton injury to the property* (Italics ours) the value of the use would be deemed to include the deterioration in

> value. *Rice v. Butler, supra.* In addition to the cases previously cited this principle is also supported in *Wheeler and Wilson Manufacturing Co. v. Jacobs,* 2 Misc. Rep. 236, 21 N.Y.S. 1006, and *Wanisch v. Wuertz,* 79 Misc. Rep. 610, 140 N.Y.S. 573."

A thoroughly modern and up-to-date case is *Pettit v. Liston,* 97 Ore. 355, 191 Pac. 660, 11 A. L. R. 487. The court refers to the conflict of authorities and to the fact that some compilers state the weight of authority to hold an infant entitled to recover without accounting for benefits received, but the court states its own conclusion to be that:

> "We find the decisions rather equally balanced both in number and respectability."

The case holds:

> "A minor who by a fair contract, without undue influence, has purchased a motorcycle on the instalment plan, cannot return the machine and recover the money paid without making reasonable compensation for depreciation of the machine while in his possession."

In the instant case it must be constantly in mind that we are dealing not with an innocent infant, but with an infant guilty of positive fraud. To such an infant we submit the only rule applicable is one which requires the infant to make the defrauded party whole. This was the rule applied by the trial judge.

A single transaction was before the trial judge, whether viewed from the plaintiff's or the defendant's standpoint. The court passed upon all the mutual rights and duties of each party before it. The conclusion reached is in accord with *Winder v. Caldwell,* 14 How. 434, 443, 14 L. Ed. 487, 491, from which we quote:

> "Although it is true, as a general rule, that unliquidated damages cannot be the subject of set-off, yet it is well settled that a total or partial failure of consideration, acts of nonfeasance of misfeasance, immediately connected with the cause of action, or any equitable defense arising out of the same transaction, may be given in evidence in mitigation of damages, or recouped; not strictly by way of defalcation or set-off, but for the purpose of defeating the plaintiff's action in whole or in part, and to avoid circuity of action."

The obvious benefits to all concerned in avoiding circuity of action and disposing of the entire controversy is further discussed in *Dushane v. Benedict*, 120 U. S. 630, 30 L. Ed. 810.

Should the two cases last cited be insufficient to uphold an affirmative recovery by defendant, we submit that the statutes authorizing equitable defenses in this case not only authorize but require the conclusion reached by the trial judge. Otherwise justice would have been done by halves and not completelly. See authorities at pages 9 and 10 of this brief.

Under the facts presented by the equitable defenses, plaintiff's fraud imposed upon him the duties and liabilities of a trustee *ex maleficio*. *United States vs. Dunn*, 268 U. S. 121, 136, 69 L. Ed. 876, 883.

CONCLUSION

The outstanding and distinguishing fact in this case is fraud. Its presence cannot be disputed. Neither can it be disputed that defendant suffered loss as a result of this fraud.

There is no occasion to enter into a consideration of the refinements of the principle of estoppel. Both par-

ties, and also the court, stand face to face with a positive wrong done by the plaintiff, which resulted in serious detriment to defendant. This wrong is inseparable from its accompanying obligation. Concerning estoppel, Professor Williston recently said: "When a lawyer or a judge does not know what other name to give for his decision to decide a case in a certain way, he says there is an estoppel." *Published Proceedings of Fourth Annual Meeting of the American Law Institute*, page 89.

It is impossible to disregard social and economic change or progress. Among other things we must recognize the tremendous growth of our cities. This is largely brought about by young men and women leaving their homes in the country to obtain lucrative employment in the centers of manufacture and industry. For like reason, city born youths seek early employment. Wages or profits received by these young persons have climbed to unprecedented heights. In competition with their elders, it is not surprising that these persons parade as adults and undertake to conceal their true age. This, however, does not justify fraud. On the contrary, we submit that in the interest of social regulation and protection this economic circumstance in itself is aboundant reason for placing restraint upon these youths by holding them responsible civilly for their frauds.

As we view this case, plaintiff would in no event be entitled to recover, first, because his asserted cause of action is unrighteous, and, second, because the defense established would preclude recovery by plaintiff.

Analysis of the issues herein shows the principal question of law to be whether, under affirmative equitable pleas interposed in a law action, the equitable maxim applies that "a court of equity ought to do jus-

tice completely and not by halves." That this maxim does apply is shown by the arguments advanced to induce the passage of statutes authorizing such defenses and also by the intent of the legislature in enacting these statues.

In conclusion, therefore, it is submitted:

1. That the motion of Hurley Motor Company, Inc., to require the entire record to be sent up should be granted.
2. That the judgment of the trial court should be affirmed.

Respectfully submitted,

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